

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

74-1726

MEREDITH CORPORATION,  
an Iowa corporation,

74 1726

Plaintiff-Appellant,

- against -

HARPER & ROW, PUBLISHERS, INC.;  
PAUL HENRY MUSSEN; JOHN JANEWAY  
CONGER; and JEROME KAGAN,

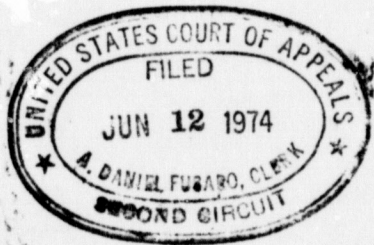
Defendants-Appellees,

BRIAN SUTTON-SMITH, an individual,  
and PRENTICE-HALL, INC., a Delaware  
corporation,

Additional Defendants on  
Counterclaim-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF



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APPELLANTS' BRIEF

STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York, dated May 24, 1974, signed by Judge Richard Owen preliminarily enjoining the sale and distribution of the book Child Psychology by additional defendant - appellant Brian Sutton-Smith, originally published by plaintiff - appellant

Meredith Corporation (hereinafter referred to as "Meredith") and now published by additional defendant - appellant Prentice-Hall, Inc. (hereinafter referred to as "Prentice-Hall") (that book will be hereinafter referred to as "BSS"). The injunction is based upon defendants - appellees' contention that BSS is a copyright infringement of the third edition of the book Child Development and Personality published by defendant - appellee Harper & Row, Publishers, Inc. (hereinafter referred to as "Harper & Row") and written by defendants - appellees Paul Henry Mussen, John Janeway Conger and Jerome Kagan (that book is hereinafter referred to as "MCK" or the "third edition of MCK"). In support of his order, Judge Owen issued a brief interim memorandum and order on May 23, 1974, and an opinion dated May 29, 1974, which has not yet been officially reported.

#### THE QUESTIONS PRESENTED

1. Does the record in the Court below establish whether BSS was substantially copied from the third edition of MCK or on the contrary that BSS made only permissible collateral use of MCK.

2. Is the grant of a preliminary injunction



against the sale and distribution of a college textbook for allegedly infringing the copyright of another college textbook an abuse of discretion where:

(a) the record below establishes extensive independent research and writing for the allegedly infringing book;

(b) in order to find infringement the district court was forced to ignore contrary evidence in the affidavits and depositions before it;

(c) the present publisher of the allegedly infringing book is a monetarily responsible publicly held corporation and there is no proof that monetary damages would not be sufficient;

(d) the allegedly infringed work is no longer on the market and in its stead the movants are distributing a revised edition which has been characterized by them as a completely new book;

(e) the movants' own papers establish a continuing injury to the publishers of the allegedly infringing book in the event of an

erroneous grant of a preliminary injunction;

(f) the movants were first aware of a possible claim for infringement 14 months before the motion for a preliminary injunction; the movants had prepared their chart of parallels and made their claim to the publishers nine (9) months before the motion for a preliminary injunction; the case had been instituted by the publisher of the allegedly infringing book six (6) months before the motion for a preliminary injunction; and the preliminary injunction order was signed two (2) weeks before the trial date.

#### THE FACTS

##### A. THE HISTORY OF THE DISPUTE

Both books in this dispute are college textbooks used in teaching child development or child psychology courses in higher educational institutions. Traditionally such course is taught to sophomores who have previously taken a course in introductory psychology.

After BSS was published by Meredith, appellee Professor Kagan, one of the co-authors of MCK, in March,



1973, some 14 months before the motion for a preliminary injunction, wrote a letter to the other appellees, his two (2) co-authors and their publisher, informing them of a possible claim of copyright infringement against BSS. In September, 1973, appellees had processed their claim to the extent of compiling a table of purported parallels substantially the same as Exhibit "A" to the moving affidavit below and initiating discussions concerning it with Meredith.

Although Judge Owen's opinion refers to "the 'race' to the Courthouse" (Joint Appendix, p. , hereinafter all references to Joint Appendix will be indicated by "JA"), the fact remains the lawsuit was instituted not by appellees but by appellant Meredith in December, 1973. The Meredith complaint alleged a claim for libel based upon appellees' publicly disseminated charges of copyright infringement. It also sought a declaratory judgment that BSS did not infringe the copyright of MCK. The copyright injunction claim of appellees was precipitated by Meredith's institution of this litigation. Appellees may now say that they intended to sue for copyright infringement, but on this all we have is surmise. In any event, the lawsuit was started six (6) months before the motion for a

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preliminary injunction.

In February, 1974, appellees counterclaimed for copyright infringement against Meredith, Brian Sutton-Smith and Prentice-Hall, who had in the interim acquired the rights to publish BSS from Meredith. In March, 1974, appellees indicated to Judge Richard Owen, the judge assigned to the case, at a pre-trial conference that they intended to move for a preliminary injunction in May, 1974. However, they abandoned this idea after Judge Owen scheduled the case for trial on June 3, 1974 (subsequently re-scheduled to June 10, 1974 because of the judge's schedule).

After an intensive period of pre-trial preparation, appellees suddenly obtained an order to show cause on Tuesday, May 14, 1974, bringing on a motion for a preliminary injunction and other relief on Monday, May 20, 1974. On the hearing on May 20, 1974, although counsel for Brian Sutton-Smith stated that his client was in the courtroom and willing to testify, no testimony was taken by the judge. Instead he relied solely on the affidavit in support of the order to show cause written by counsel for appellees; two (2) new affidavits served on appellants at the hearing; and two (2) transcripts of depositions of Brian Sutton-Smith.



At the hearing, Judge Owen was presented for the first time with copies of MCK and BSS. The hearing concluded at approximately 5:00 PM and the New York Law Journal indicates that Judge Owen was trying a case for the balance of the week. On Thursday, May 23, 1974, Judge Owen's chambers telephoned counsel to inform them of the judge's interim decision to enjoin BSS. This decision was formalized in a written injunction order on May 24, 1974, and on Wednesday, May 29, 1974, Judge Owen issued his formal opinion.

In his interim opinion and decision, Judge Owen reiterated that the trial would start on June 10, 1974. This trial is being conducted as this brief is being written. Thus the preliminary injunction was issued approximately two (2) weeks before the start of the trial on the merits.

#### B. HOW BSS WAS WRITTEN

Both Judge Owen and the appellees place great emphasis on the manner in which BSS was written. In contrast to their distorted view, BSS was prepared in a way consistent with accuracy and independent creative endeavor, albeit in a way different from that of the so-called con-

ventionally written textbook. Indeed the method by which BSS was written is in no way unique to appellants. It is commonplace in the writing of textbooks for use in elementary and high schools. It is of increasing importance in the writing of texts for colleges, as can be seen from the fact that the principal free-lance writer for BSS, Lawrence Locke, testified at his deposition that he worked on such books not only for Meredith but for a number of other distinguished American publishers (Sutton-Smith affidavit, paragraph 12, JA ).

Initially, Meredith conducted a market study (Exhibit "B" to the moving affidavit, JA ). Appellees stress a few sentences of the market report taken out of context. Read as a whole, however, the market report is an attempt to analyze the type of book desired by the professors teaching child psychology courses. In doing so, it discusses not only MCK but the other books competitive with it, pointing out for MCK as well as the others both their strong points and weak points. Clearly an objective reading of the market report establishes that Meredith desired not to copy MCK but to write a better book, more responsive to the needs of the market.



Meredith signed a contract with Brian Sutton-Smith to act as author of the book. Professor Sutton-Smith has been since 1967 a full professor of psychology and education at Teachers College, Columbia University, and Program Coordinator (a position comparable to Chairman of the Department) of that institution's Development Psychology Program. He is the author of eight (8) books in the field of child and developmental psychology in addition to the book in litigation and has been teaching introductory courses in child psychology since 1956 (Sutton-Smith affidavit, paragraph 2 and Exhibit "A", JA ).

The opinion below and appellees stress the allegedly low royalty rate received by Professor Sutton-Smith. This ignores the approximately \$9,000 paid to Professor Sutton-Smith as an advance against royalties and for his expenses. It also ignores the significantly higher cost incurred by Meredith in hiring free-lance writers and researchers and greater overhead cost caused by the far more extensive participation of the Meredith editors in the writing of the book.

Despite the attempts of appellees to denigrate Professor Sutton-Smith's role, BSS is clearly his book.

His first task was to establish the basic philosophical tone for the entire work; in technical terms, a constructivist, pluralistic interactionist viewpoint (Sutton-Smith affidavit, paragraphs 5 and 6 and Exhibit "B", JA ; Sutton-Smith transcript, p. 17-20, 161-162, JA ). Thereafter he would furnish the Meredith editor, Julie Small, source materials upon which to base the various chapters. These would include not only a plethora of books and articles but his own personal lecture outlines and material written by him for the occasion. Thereafter, Professor Sutton-Smith and Miss Small would have intensive discussions about the chapter (Sutton-Smith affidavit, paragraph 5, JA ; Sutton-Smith transcript, p. 25, 31, 36-37, JA ). In addition, Miss Small had the benefit of paid researchers who would furnish the writer of each chapter with abstracts of studies in particular areas to simplify his writing task (Sutton-Smith affidavit, paragraph 5, JA ; Sutton-Smith transcript, p. 67, JA ).

Based upon this, Miss Small would prepare a chapter outline for a free-lance writer for each chapter in the book. In addition to the outline, the writer would be furnished with what one of them characterized on deposition



as a shopping bag full of materials, the notes of Professor Sutton-Smith and the researcher and various pertinent books and articles (Sutton-Smith affidavit, paragraph 10, JA           ). The use of free-lance writers had two (2) advantages. First it would allow the book to be written with greater emphasis on style, readability and comprehension, a factor of increasing importance because of the rapidly declining reading comprehension of college students. Thus BSS is more graspable by the average college student than MCK with its ponderous style and heavy use of jargon. Second, this method allows a book to be written faster thereby avoiding the problem of conventionally written texts where the first few chapters are already out of date by the time the final chapters are written a few years later (Sutton-Smith affidavit, paragraphs 4 and 12, JA           ).

The free-lance writers first draft would be furnished to Professor Sutton-Smith who would make extensive revisions and suggestions, frequently including rewriting of passages to be included in the revised work. He would thereafter receive a second revision based upon his comments and that of the Meredith editors. Again he would make his comments. When the work was printed in galleys, he would make

still further revisions. He discussed the book with a number of specifically named graduate students and professional colleagues at Teachers College. One of them, Dr. Lois Bloom, made revisions on the galley proofs of the language section (Sutton-Smith affidavit, paragraph 10, JA ; Sutton-Smith transcript, p. 35-36, 70-75, JA ).

Professor Sutton-Smith analogizes this process to the writing of his opposing affidavit. In both cases, the first draft was prepared by another person; in the case of the book by the free-lance writer; in the case of the affidavit by his attorney. But this was based upon the conversations and materials supplied by the Professor. In both cases, he examined the drafts and made the necessary revisions so that he considers himself the author of both book and affidavit (Sutton-Smith affidavit, paragraph 11, JA ).

The opinion below questions how a free-lance writer could prepare a chapter of a book on child psychology. This ignores the real function of the writer. His specialty is not what is said but how it is said. He is not writing for a group of professional psychologists steeped in the discipline. Rather, he is writing for college sophomores



with little background in psychology and frequently poor ability in reading comprehension. His work was edited and revised by a distinguished child psychologist, Professor Sutton-Smith.

Of course, this method of writing a book is different from the way conventional textbooks including MCK had been written. But that does not necessarily mean that this method is improper. Indeed, it is not even a cheaper method since it entails additional cost for researchers and free-lance writers and a much heavier contribution in time by the editor.

#### C. THE COMPARISON BETWEEN THE BOOKS

Ultimately as in any copyright case, the test of infringement is a comparison of the two (2) works. Of necessity, the two (2) works must be similar because they both were written for the same purpose - to convey information to the introductory student of child psychology. As a consequence, the contents are largely dictated by the discipline and the needs of the professors teaching the course throughout the country.

Appellees stress that both books use the chronological approach; that is, they cover the child chrono-

logically through various stages from genetic and prenatal influences through infancy to adolescence. This is, of course, a highly logical approach and is used by most of the major textbooks in the field. The chronological approach to child psychology is as much dictated by the nature of the subject matter as it is in history or civil procedure (Sutton-Smith affidavit, paragraph 7, JA ).

Appellees ignore the significant difference in the organization of the two (2) books. MCK discusses the following stages in a child's development: first year, second year, ages 2 to 5, ages 6 to 12 and adolescence. In contrast, BSS is organized under the following stages: first 18 months, toddlerhood or ages 2 and 3, ages 4 through 7, ages 8 through 12 and adolescence. This difference is not an arbitrary reworking of the materials but according to Professor Sutton-Smith, is based upon the theoretical concepts of Piaget. Similarly, the organization of BSS within each stage is based upon the approach of Eric Erikson (Sutton-Smith affidavit, paragraphs 8 and 9, JA ; Sutton-Smith transcript, p. 42, 51-53; JA ). At his depositions before the Court,



Professor Sutton-Smith testified at length about the difference in coverage between the two (2) books. For example, the work of Heinz Werner is barely mentioned in MCK but given extensive treatment throughout BSS. The whole subject of cognitive development and the theories of Piaget and Erikson are stressed. Interestingly, the fourth edition of MCK written after BSS is more similar in viewpoint to BSS than the third edition alleged to have been infringed.

To establish the alleged infringement, appellees prepared a chart of parallels. These very charts frequently establish that BSS was based upon an examination of a number of sources, not just MCK. The best proof of this was supplied by Judge Owen in Appendix 3 to his opinion (JA        ). That appendix quotes the description of MCK and BSS of the same experiment. Of course, both works would of necessity be similar as they are describing the same thing. But in the passage what Judge Owen contends establishes plagiarism, BSS expresses an idea in no way expressed in MCK - the reason that pre-schoolers do better as nonreversal shifts "because part of their earlier responses are still adequate; half the large blocks are the right color".

A similar example is given in Brian Sutton-Smith's opposing affidavit - parallels 3 and 4, a discussion of the philosophy of John Locke and Jean Jacques Rousseau. Ignored in that chart is the fact that BSS discusses David Hume and Immanuel Kant in the same passages, two (2) philosophers totally ignored in MCK. Moreover, unlike MCK where this discussion is included simply for the purpose of historical background, BSS goes on to demonstrate in detail how certain contemporary child psychologists embrace either the viewpoint of Locke and Hume on the one hand or Rousseau and Kant on the other, an idea barely hinted at on MCK (Sutton-Smith affidavit, paragraph 14, JA ).

Professor Sutton-Smith also analyzes parallels 82 through 92, the subject of the letter of July 22nd, reproduced in Judge Owen's opinion (JA ). That indicates that of the approximately 600 lines in BSS, 31 lines express ideas found only in the book and in the primary article upon which the ideas expressed are based and 165 lines express ideas unique to BSS. 163 lines set forth ideas to be found in the primary source as well as both books and 165 lines express ideas found in both BSS and MCK (75 lines do not fit into this classification scheme). Thus



it is clear that BSS not only referred to the common primary source but expressed new concepts about the entire subject (Sutton-Smith affidavit, paragraph 15, JA ).

In other purported parallels, what is similar are the ideas expressed, but not the means of expression. For example, ~~Appendixes~~ 1 and 2 to Judge Owen's opinion (JA ) concern well established indisputed facts about the sense perception of newborns and the ossification rate of infants. MCK obviously has no monopoly on these facts nor can it have a monopoly on the obvious analogy between the relatively well developed senses of a human newborn and a blind and deaf puppy - obviously the newborn animal most familiar to an American college student.

Appellees also stress purported parallel 41, a report of a then unpublished experiment of appellee Kagan. The MCK copyright does not protect the facts uncovered by that experiment any more than the BSS copyright protects the facts about the unpublished research referred to frequently in BSS (Sutton-Smith affidavit, paragraph 16, JA ).

In his opinion, Judge Owen claims more than one-third of BSS was copied from MCK. It is impossible to

determine how the judge arrived at this figure since an analysis of appellees' purported parallels show they cover by line count some 11% both of material allegedly appropriated from MCK and allegedly taken by BSS. This 11% figure requires taking appellees chart at face value despite their obvious invalidities as pointed out above. Significantly, appellees' chart of parallels contain few instances where the language is the same. Appellants were in the process of preparing a detailed analysis of all of the purported parallels. Because of the technical nature of the subject matter, the work was in no way completed by the time the motion was made. However, the mistake Judge Owen made in Appendix 3 when he apparently ignored the significant difference between the works demonstrates the importance of a close analysis of this chart, a task Judge Owen simply did not have the time to perform.

We submit that such a careful reading of both books and the parallels will demonstrate that BSS is the product of a detailed independent effort which made only collateral use of MCK. It is a different book with a different viewpoint, different coverage and, of course, much better and simpler writing.



D. THE ALLEGED PROOF OF COPYING

Judge Owen and appellees stress a number of documents which they contend establish plagiarism. To do so, they ignore the material in the very same documents which establish independent research. Thus they handed Judge Owen a compendium of a number of chapter outlines given to the writer, Exhibits "32", "33", "42(b)", "43(c)" and "45(b)". These outlines contain references to a whole host of material furnished to the writer, including frequent references to researcher's notes. A few references to MCK by Professor Sutton-Smith are emphasized although the very same exhibits contain reference after reference to other works (incidentally as Professor Sutton-Smith testified, Sutton-Smith transcript, p. 205, 224, JA , Mussen references are frequently not to MCK but to the Mussen edition of the Carmichael Handbook, a two volume source book of basic monographs in the field) (Exhibits 79, 80, 83, 86, JA ).

Frequently, the material emphasized by appellees is nothing more than a preliminary reference to MCK to give a relative newcomer in the field a quick indoctrination in it. Thus Exhibit 35 (JA ) is an

attempt by Professor Sutton-Smith to set forth an organization different from MCK by showing how the material in MCK would be organized using Professor Sutton-Smith's approach rather than the one actually used by MCK. This, of course, was done at a preliminary stage when there was then no material of BSS to refer to. Similarly, a letter to the writer of a proposed workbook including a copy of MCK to give her an idea of the field "until you receive our manuscript" (Exhibit "C" to the moving affidavit, JA ) is treated as some sinister proof of intentional plagiarism when all it is is an attempt to use MCK for the function it was designed for, an introduction to the field.

Judge Owen's opinion stresses some similarity between either some preliminary outlines prepared by Julie Small or outlines of MCK chapters prepared by her and the final outline prepared for the writer. To make these comparisons, appellees had to engage in extensive cutting and pasting of the allegedly copied outlines, jumping from page to page of the outlines, and even in some cases, to different outlines. But in any event, this is irrelevant to the real question - was the material in MCK copied in



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BSS. The fact that Professor Sutton-Smith noted the similarity between the manuscript of his book and MCK is proof not of any intention to copy but rather of his good faith. These similarities were pointed out in an attempt to have this material changed (Sutton-Smith affidavit, paragraph 17, JA ).

Other exhibits are relied upon by appellees who give a sinister cast to isolated sentences in them. See Exhibit "E" to the moving affidavit (JA ); a single reference in a comment sheet by a Meredith employee no longer available to testify, and Exhibit "F" to the moving affidavit (JA ); an instruction sheet to that employee with an ambiguous reference to the model.

In any event, these few documents can not obscure the contrary evidence of substantial independent research and work.

#### ARGUMENT

#### INTRODUCTION

Before discussing the merits of this appeal, two (2) preliminary points must be dealt with. It can be

presumed that this Court will ask why this appeal is being taken in light of the fact that by the time oral argument is held, the trial on the merits will have been concluded. The reasons for this appeal are twofold. First, as will be discussed in Point II below, appellants are suffering irreparable injury as a result of the preliminary injunction below. The sooner this can be corrected, the better. Second, the approach taken in the opinion below departs so much from the well-established principles of copyright law that we believe the guidance of this Court is necessary in order to prevent similar errors in the opinion upon the merits.

We will demonstrate below that the order below is improper both because it is based upon errors of law and is an abuse of discretion. It is well settled that an appellate court can always overturn a preliminary injunction decree based upon an error of law. Societe Comptoir v. Alexander's Department Stores, 299 F. 2d 33, 35-36 (2nd Cir. 1962); Ring v. Spina, 148 F. 2d 647, 650 (2nd Cir. 1945). We submit that the lower court's decree is based on an erroneous reading of the law of copyright.

Further, this Court has consistently refused to



abdicate its responsibilities to review grants and denials of preliminary injunctions and has held that such orders are "subject to meaningful appellate review". W. E. Bassett Co. v. Revlon, Inc., 354 F. 2d 868, 871 (2nd Cir. 1966). In Carroll v. American Federation of Musicians, 295 F. 2d 484, 488 (2nd Cir. 1961), this Court adopted the test of appellate review for injunction motions previously laid down by the First Circuit in In Re Josephson, 218 F. 2d 174, 182 (1st Cir. 1954).

"...'"Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant facts.'"

#### POINT I

THE COURT BELOW FAILED TO DISCUSS, LET ALONE FOLLOW, THE LAW GOVERNING COPYRIGHT OF THE TYPE OF WORKS BEFORE IT.

The opinion below is singularly silent on the most important issue before it - what precisely is protected by a copyright of a factual work. Here the evidence before the Court shows that some 11% of the material in BSS

finds parallels to a greater or lesser extent in MCK. But significantly there is little claim of similarity of expression. Instead, there is what is claimed to be similar is the ideas expressed although, of course, they constitute the subject matter of the discipline purported to be set forth by both works. Present in the record before Judge Owen, although ignored by him, is evidence of extensive independent activity and research by appellants. In this perspective, the protection afforded by the MCK copyright, similar to the protection afforded a copyright of any other work of fact, is much less than that afforded to the work of the creative imagination such as a novel or a work of art. All that the MCK copyright protects its holders from is an appropriation of another's use of the means of expression or wholesale appropriation of its research.

The study prepared on fair use for the Copyright Revision Program sets forth the problem as follows:

"The conflict between the right to "use" and the right to publish or copy is sharply presented in the area of scholarly works; this area includes such fields as science, law, medicine, history and biography. Research is the foundation of such works. And research has flippantly been defined as 'plagiarism from



two or more sources.' One court suggested that—"with reference to works in regard to the arts and sciences, using those words in the broadest sense \* \* \* authors are sometimes entitled, indeed required to make use of what precedes them in the precise form in which last exhibited.\* \* \*"[Emphasis added.]

"The decisions in the field of scholarly works, as well as those concerning compilations, do present special problems by reason of the identity of subject matter covered by groups of works. It may be that the character of a work—as a scientific work, parody, etc.—is an extremely significant factor. In any event, the decisions in the lawbook field, for example, have accurately been characterized by a recent court as 'somewhat confusing.' Despite this confusion, it may be that the basic issue in each case is whether an earlier work has been collaterally used or substantially copied as well." Latman, Fair Use of Copyright Works, pages 10-11, Study #14, Senate Subcommittee on Patents, Trademarks and Copyrights (1960).

The case quoted in the study, Sampson & Murdock v. Seaver-Radford Co., 140 Fed. 539, 541 (1st Cir. 1905), has been repeatedly quoted in the subsequent cases. In particular, this rule has been followed by this Court in a number of subsequent cases. Thus in Chautauqua School of Nursing v. National School of Nursing, 238 Fed. 151, 153 (2nd Cir. 1916), the Court rejected a plaintiff's contention that its copyrighted printed lecture on how to administer a hypodermic injection was infringed by defendant's com-

petitive printed lecture even though plaintiff asserted it was the first to treat separately the various steps in the operation. Thus this Court stated:

"The complainant had no monopoly of the things taught in its lecture, because they were the common teaching. Maj. Reynolds, in preparing his lecture, had a right to consult all previous publications on the subject, including the complainant's lecture No. 6, and to state in his own language what he thought to be the proper and the best practice. From the nature of things there were certain to be considerable resemblances, just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself."

A most dramatic proof of this rule is Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 68' (2nd Cir. 1938). In that case, the works in question were what is popularly known as "cram books" designed to help high-school students pass the New York State Regents examination. Plaintiff contended (1) defendant's title was confusingly similar to that of plaintiff's work on American history and, hence, defendant was guilty of unfair competition; (2) the cartoons in defendant's book constituted an infringement of plaintiff's cartoons; and (3) the text of defendant's book



infringed the copyright on plaintiff's text. The record established that defendant's book was written after defendant "became aware of [plaintiff's] success and desired to publish a book better able to compete with it than any he then had" (at 691). This Court agreed that defendant's cartoons were an infringement of plaintiff's cartoons. There were common mistakes of historical fact in both books. Yet, despite all of the foregoing, it held that defendant's text did not infringe plaintiff's text. In so doing, it enunciated the criteria determining when one textbook is an infringement of an earlier textbook on the same subject.

"The plaintiff's book was designed to convey information to the reader. The defendant authors were as free to read it as anyone else and to acquire from it such information as they could. They could, indeed, with equal right obtain such misinformation as it contained, for the copyright gave no monopoly of the contents of the book, *Arnstein v. Edward B. Marks Music Corp.*, 2 Cir., 82 F. 2d 275. And so far as plaintiff's copyright is concerned, they could use whatever of either character they gleaned from the book in their own writing provided they did not copy any substantial part of the copyrighted work but created something distinctly their own. This does not necessarily mean something other than what has been 'put into words' in the copyrighted work for then an accurate and comprehensive treatise on algebra, for instance, would if copyrighted prevent another from later writing one as accurate and comprehensive during the copyright term. The

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true concept of what a copyright covers as well as what it does not was given by Judge Learned Hand in *Arnstein v. Edward B. Marks Music Corp.*, supra, when he said, "The 'sole liberty of printing, publishing and vending' the 'work' means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean 'the sole liberty' to create other 'works', even though they are identical". This applies with especial force to works on the same period in history. The subject matter is of necessity what events have made it and the order of treatment whether that be chronological or topical is fixed by the facts. Even the somewhat limited matter of selection is curtailed in such condensed works, designed for elementary school study, as those with which we are here concerned.

"For the foregoing reasons no need exists for analyzing in detail the fairly numerous places in the text in each book where substantially the same thing on the same subject has been said in different words. That was proper enough and, indeed, inevitable if both books were to serve their purpose. They had to contain the more important facts of history. This being so, no sound reason remains for saying that the accused book in its text is a copy of any substantial part of the copyrighted book. True it is that at times one or more descriptive words used in the plaintiff's book are utilized to describe the same thing in the defendants' but in no material respect are the same words gathered together sufficiently to show that the copyrighted work was copied. Mere similarity of phraseology which has, indeed, become more or less stereotyped in some respects in school histories is a weak support for a charge of infringement. See, *Sampson & Murdock v. Seaver-Radford Co.*, 1 Cir., 140 F. 539."



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Although the dignity, the sophistication and complexity of the works in question here are much greater than that in the Oxford case, the same rules apply. In both instances, the nature of the subject matter and the dictates of the curriculum for which the books were written mandate inherent similarities. The Oxford case also demonstrates that a few instances of common mistakes do not in and of themselves constitute proof of infringement especially when there is extensive proof of independent research. See also Chamberlin v. Uris Sales Corp., 150 F. 2d 512 (2nd Cir. 1951); Polk & Co. v. Musser, 105 F. Supp. 351 (E.D.Pa.), affirmed 196 F. 2d 1020 (3rd Cir. 1952).

Incidentally, the regents "cram" book cases cited by Judge Owen are easily distinguished. College Entrance Book Co. v. Amsco Book Co., 119 F. 2d 874 (2nd Cir. 1941) involved the taking of word lists for French "cram" books, and Colonial Book Co. v. Amsco Book Co., 41 F. Supp. 156 (S.D.N.Y. 1941) involved the taking of laboratory diagrams for chemistry "cram" books. The matters taken thus had a greater protectability than the text in the Oxford case, exactly the same way that the cartoons in the Oxford case were given greater protection.

The Oxford case was followed by this Court in Ricker v. General Electric Co., 162 F. 2d 141, 142 (2nd Cir. 1947):

"Where access is proved, or assumed as in the case at bar, likenesses between the copyrighted work and the putative piracy may give rise to an inference of plagiarism; but such an inference is necessarily greatly weakened when the similarities relate to the expression of scientific principles which must necessarily be stated in more or less stereotyped language. See Oxford Book Co. v. College Entrance Book Co., 2 Cir., 98 F. 2d 688, 691."

The leading case in this area is Rosemont Enterprises, Inc. v. Random House, 366 F. 2d 303 (2nd Cir. 1966). That case has been cited in a number of subsequent cases as the definitive delineation of the fair use defense. Most important for our purposes is this Court's discussion, at 309-310, of the error of the court below in requiring proof of independent research.

"While recognizing that 'historical fact and events in themselves are in the public domain and are not entitled to copyright protection \* \* \*,' Lake v. Columbia Broadcasting System, Inc., 140 F. Supp. 707, 708-709 (S.D. Cal. 1956); see Collins v. Metro-Goldwyn Pictures Corp., 106 F. 2d 83, 86 (2d Cir. 1939), and that 'a writer may be guided by earlier copyrighted works \* \* \*,' Benny v. Loew's, Inc., 239 F. 2d supra, at 536; see Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688, 691 (2d Cir. 1938), the court asserted in sweeping language that



an author is not entitled to utilize the fruits of another's labor in lieu of independent research and relying on Toksvig v. Bruce Publishing Co., 181 F. 2d 664 (7th Cir. 1950), stated that such activity could not be considered a fair use. Moreover, the court assigned the 'apparent lack of independent research' as an additional reason for refusing to honor defendant's fair use claim. With this conclusion we disagree as a matter of law.

"In Toksvig v. Bruce Publishing Co., supra, the Seventh Circuit affirmed the grant of an injunction, in favor of an author who had written a careful biography of Hans Christian Andersen based on exhaustive research into Danish sources, against the publication of a subsequent biography of Andersen by an author who due to his inability to speak or read Danish had not independently examined the Danish sources and who had copied twenty-four specific passages of the first author's book. While the decision can be considered to rest on the ground that substantial and material copying was demonstrated, see Nimmer, Copyright at 133n. 576 (1964), the court went on to say that the use of plaintiff's book was not a fair use for the reason that reliance on the English translations of the Danish sources enabled the defendant to complete her book in much less time than it took plaintiff. Id. at 667. We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. See Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569, 1584 (1963) (criticizing

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Toksvig v. Bruce Publishing Co., supra)."

The treatment by Rosemont of the Toksvig case is crucial. The plaintiff there had performed the essentially creative task of translating letters of Hans Christian Andersen from Danish into English in writing her biography of Andersen. This Court specifically stated that a newcomer need not retranslate these letters in preparing his new biography, but can rely on plaintiff's work in order to save time and effort. At best, appellees' claim can be that the persons working on BSS saved time and effort. But the Rosemont treatment of Toksvig indicates that this is permissible in this Circuit.

The Rosemont case also distinguished this Court's earlier decision in Orgel v. Clark Boardman Co., 301 F. 2d 119 (2nd Cir. 1962), cited by the court below. There there was none of the evidence of independent work and reliance upon other sources present both in Rosemont and here.

The Rosemont case was quoted and followed in Norman v. Columbia Broadcasting System, 333 F. Supp. 788 (S.D.N.Y. 1971). That case quoted from Myers v. Mail and Express Co., an unreported decision of Learned Hand when sitting as a district judge:



"\* \* \*not only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chronologically,-or at least, such is the convention,-the order in which the facts are reported must be the same in the case of a second supposed author. There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection, although into that selection may go the highest genius of authorship, for indeed, history depends wholly upon a selection from the undifferentiated mass of recorded facts.' Myers v. Mail & Express Company, 36 C.O.Bull. 478, 479 (S.D.N.Y. 1919) (unreported)."

In McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971) the Court was confronted with a motion for preliminary injunction against an allegedly infringing college textbook. The Court there did not have to reach the issue of whether the defendants' book had a fair use defense under the Rosemont rule since it held that plaintiff had failed to meet its burden of showing "piracy with reasonable certainty" (at 421). It followed the well-settled rule that a copyright does not protect an idea, only its means of expression.

"If the allegedly copied 'patern' in this case should turn out to be plaintiffs' abstract ideas themselves, rather than their concrete expression, then their copyright would not be infringed. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., supra, 274 F. 2d 487 (2d Cir. 1960). This is because theories and concepts

are in the public domain; the copyright laws seek 'To promote the Progress of Science and useful Arts,' U.S. Const. Art. 1, §8, not to stifle progress by granting intellectual monopolies."

Essentially, the accusations against BSS are precisely the allegations held not to constitute infringement in Chatauqua, Oxford, Ricker, Rosemont, Norman and McGraw-Hill.

The error of the Court below is not only the product of an erroneous view of the law but improper credibility findings as well. Nowhere does the judge discuss the independent research in preparing the BSS book even though such work is apparent not only in the affidavit and depositions before the Court but in the documents produced by appellees as well. This ignoring of a portion of the record below parallels a similar ignoring by the court below in Rosemont of the independent research in that case criticized by this Court at page 306 thereof. The judge's attempt to resolve a factual dispute in favor of appellees in the face of contrary affidavits and depositions from appellants is impermissible, particularly where he has resolved the dispute "in favor of the party who has the burden of establishing his right to preliminary relief".



Dopp v. Franklin National Bank, 461 F. 2d 873, 879 (2nd Cir. 1972). This is particularly true here where the Court below was invited to take the live testimony of Professor Sutton-Smith but never accepted the offer.

Curiously enough Judge Owen quotes Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 73, 85 (6th Cir. 1943) in discussing fair use (JA ). The portion quoted by Judge Owen twice refers to the fact that a determination of fair use requires "a consideration of all the evidence". Despite this, Judge Owen seemed to have ignored all of the evidence put forth by the appellants.

Such a resolution of factual disputes on the basis of affidavits and depositions is particularly inappropriate where the relief sought is an injunction against a book protected by the First Amendment. In Rosemont Enterprises, supra, this Court followed earlier New York State Court decisions in Pocket Books, Inc. v. Dell Publishing Co., 49 Misc. 2d 252, 256, 267 N.Y.S. 2d 269, 273 (1966) and Estate of Hemingway v. Random House, 49 Misc. 2d 726, 268 N.Y.S. 2d 531, affirmed without opinion 25 A.D. 2d 719, 269 N.Y.S. 2d 366 (1966) that movants for a preliminary injunction involving books are held to an even more drastic

standard than that imposed on movants where the subject matter does not enjoy First Amendment protection. In the words of the Hemingway case as quoted in Rosement, such relief would not be granted in the absence of "a showing by the movant of a right, both legal and factual, in most unequivocal terms". The surmises and conjectures of the Court below combined with its ignoring of appellants' contrary showing hardly meets that description.

#### POINT II

#### THE COURT BELOW ABUSED ITS DISCRETION BY GRANTING A PRELIMINARY INJUNCTION

Over the years well settled criteria have been established for the grant or decline of a preliminary injunction. These criteria were largely overlooked by Judge Owen in his grant of appellees' motion. For example, additional defendant - appellant Prentice-Hall is a large publicly held corporation with net assets in excess of \$100,000,000 (Berger affidavit, paragraph 15, JA                      ). Neither Judge Owen nor the appellees have demonstrated why monetary damages would not suffice to recompense them for any proven damage. In similar cases, particularly those involving books,





below:

"In normal practice, once a text is adopted by a professor for his course, he continues its use for a number of years, being unwilling to revise the teaching notes for his course to dovetail with a different text."

But neither Judge Owen nor appellees explain how this fact can justify a preliminary injunction in light of the necessary conclusion that if a preliminary injunction is improperly granted, it would affect the sales of the Sutton-Smith book not only during the enjoined period but for a number of subsequent years. On the other hand, an erroneous denial of a preliminary injunction will have no effect in subsequent years when the infringing book will have been enjoined but after a full and complete trial of the issues.

In our discussion of the history of this litigation in A above, we have shown how appellees have waited 14 months since the time they first learned of the possible claim; nine (9) months since they first presented the claim to Meredith and prepared their major exhibit in support of it; and six (6) months since the action had been instituted, not by them but by Meredith, to move for a preliminary injunction and this less than a month before the trial. It is well settled rule in copyright and other areas that such



a delay by itself defeats a motion for a temporary injunction. Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc., 335 F. Supp. 278 (S.D.N.Y. 1971); Irving J. Dorfman, Inc. v. Borlan Industries, Inc., 309 F. Supp. 21 (S.D.N.Y. 1969); Klauber Brothers, Inc. v. Lady Marlene Brassiere Corp., 285 F. Supp. 806 (S.D.N.Y. 1968); Thomas Wilson & Co. v. Irving J. Dorfman, Inc., 286 F. Supp. 711 (S.D.N.Y. 1967).

Judge Owen attempted to justify appellees' tardiness in three (3) ways. First, appellees supposedly made extensive discoveries of documentary and testimonial evidence in April and May purportedly supporting their contentions. In fact, as noted at page 44 in appellees' brief below, "they obtained the relevant documents in the third week of March". The so-called testimonial evidence consisted of acknowledgments of documents by the witness. Indeed, some of the alleged testimonial evidence occurred after the order to show cause bringing on the motion for a preliminary injunction. Appellees do not explain why they had to wait an additional two (2) months and then with incomplete papers to bring on a motion for a preliminary injunction. Moreover, they ignore the fact that their principle evidence, the chart of purported parallels, was

ready in September, 1973, some nine (9) months before the motion was made.

Second, Judge Owen contends that appellees' tardiness is excused by the fact that the sale of textbooks for the 1974 - 1975 season might be sooner than in prior years because of the paper shortage. But that fact was probably known to appellees well before they moved.

Third, Judge Owen states the trial date was in jeopardy because of discovery problems. These discovery problems were, however, resolved successfully for appellees by the other branches of the motion brought on by the order to show cause. Obviously, such motions would have the same merit whether or not accompanied by a motion for a preliminary injunction. On the contrary, Judge Owen's reiteration in his interim decision and order of the June 10, 1974 date further militates against the grant of a temporary injunction. Why should an injunction be granted two (2) weeks before the trial on a necessarily incomplete record. This is particularly so where appellees' own tardiness in seeking such relief denies their now asserted present urgent need for it.

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COTTON CONTENT

CONCLUSION

For all the reasons stated herein, we respectfully submit that the preliminary injunction of the Court below be reversed because it is based upon mistakes of law, improper credibility findings and constitutes an abuse of discretion.

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CONCLUSION

For all the reasons stated herein, we respectfully  
submit that the preliminary findings of the Court below  
are based upon a misreading of the facts.  
Improperly admitted evidence and conclusions are based on  
speculation.

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